Windstream Corporation *and* International Brotherhood of Electrical Workers, AFL–CIO, CLC on behalf of its affiliated Local Unions 463, 1189, 1507, 1929, 2089, and 2374. Case 6–CA–35483

May 23, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On August 9, 2007, Administrative Law Judge Wallace H. Nations issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, the Respondent filed an answering brief, and the Charging Party filed a reply brief.[1]

The National Labor Relations Board[2] has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified below.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Windstream Corporation, Meadville, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraphs 2(b) and (c) and reletter the subsequent paragraph.

"(b) Within 14 days after service by the Region, post at its facility in Meadville, Pennsylvania, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 25, 2006.

"(c) Within 14 days after service by the Region, post the attached notice marked "Appendix" electronically on the Respondent's intranet with a link sent by electronic mail to its employees."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

[1] Pursuant to the judge's recommended Order, the Respondent sent its employees an e-mail dated August 24, 2007, informing them that the Respondent had modified the portion of its "Working with Integrity" policy that prohibited employees from discussing their compensation and other information with others. The e-mail set forth the language of the rule as modified. Subsequently, the Charging Party filed a Motion to Reopen the Record to receive a copy of this e-mail, which is attached to the motion as "Exhibit A." The Respondent filed a response stating that it joined the Charging Party's motion. Because the Respondent's August 24 e-mail was not available prior to the close of hearing, and may be relevant to the compliance phase of this proceeding, we grant the Charging Party's motion.

[2] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[3] No party has excepted to the judge's findings with respect to the underlying complaint allegations. We grant the General Counsel's and Charging Party's exceptions to the judge's failure to require the Respondent to post the Board's standard remedial notice. See *Riverboat Hotel*, 319 NLRB 176, 177 (1995). Consistent with our adoption of the judge's finding in *Windstream Corp*., 352 NLRB 44 (2008), that the Respondent regularly communicates its employment policies to employees through electronic mail, we shall order the Respondent to post the attached notice on its intranet and transmit the notice to its employees via e-mail.

Chairman Schaumber agrees to the Order based on the particular circumstances of this case. He notes that in the prior case involving the same parties, the Respondent did not except to the judge's finding that it regularly communicates its employment policies to employees via e-mail. *Windstream*, supra. And, in this case, it did not except to the judge's recommended order instructing the Respondent to communicate its rule modification to employees electronically.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Choose not to engage in any of these protected activities.

WE WILL NOT implement or maintain as a part of our "Working with Integrity" policy or elsewhere, provisions prohibiting you from disclosing your compensation, benefits, or personnel records or information to others.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE HAVE rescinded the provisions of our "Working with Integrity" policy that prohibit you from disclosing your compensation, benefits, or personnel records or information to others, and WE HAVE notified all employees that this has been done.

WINDSTREAM CORPORATION

Barton Meyers, Esq., for the General Counsel.
William C. Moul, Esq., of Columbus, Ohio, for the Respondent Employer.
Jonathan D. Newman, Esq., of Washington, D.C., for the Charging Party Union.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. This case was tried in Pittsburgh, Pennsylvania, on June 5, 2007. The charge was filed by the International Brotherhood of Electrical Workers AFL–CIO, CLC on behalf of its affiliated Local Unions 463, 1189, 1507, 1929, 2089, and 2374 (the Union) on February 1, 2007,[1] and the complaint was issued March 6, 2007. The complaint alleges that Windstream Corporation (Respondent or Windstream) engaged in conduct in violation of Section 8(a)(1) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint wherein it admits, inter alia, the jurisdictional allegations of the Act. The answer in addition to denying many of the complaint allegations raises a number of affirmative defenses. It alleges that the complaint was improperly issued, contrary to Section 10(b) of the Act, because it relates solely to conduct occurring more than 6 months prior to the filing of the charge. It alleges that the complaint issued prematurely, with total disregard for the provisions of Section 10068 of the Board's Casehandling manual, as well as other routine procedures followed by the Board, thus reflecting that its issuance was an abuse of discretion. It also alleges that Board policy requires deferral of this dispute to the grievance and arbitration machinery of the separate collective-bargaining agreements between Respondent's subsidiaries and the respective Local Unions referenced in paragraph 7 of the complaint; that issuance of the complaint is inconsistent with said policy; that no reason for deviating from said policy exists; and, that issuance of the complaint was, therefore, an abuse of discretion.

[1] All dates are 2007, unless otherwise indicated.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Party, and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Delaware corporation, with its headquarters in Little Rock, Arkansas, and an office and place of business, inter alia, in Meadville, Pennsylvania, has been engaged in the business of providing voice, data, and video telephonic communication services. During the 12-month period ending January 31, 2007, Respondent, in conducting its business, derived gross revenues in excess of $100,000 and purchased and received at its Pennsylvania facilities goods valued in excess directly from points outside of the Commonwealth of Pennsylvania. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Complaint Allegations

About July 17, 2006, Respondent was created in a spinoff of the landline telephonic business of Alltel Corporation and its affiliates (Alltel), and since then has continued to operate the landline business of Alltel in basically unchanged form and has employed, as a majority of its employees, individuals who were previously employed by Alltel. Since the spin-off of the landline business of Alltel, Respondent has recognized as the exclusive collective-bargaining representative of units of its employees, IBEW Local Union 463 located in Lebanon, Kentucky; IBEW Local Union 1189 located in Fulton, New York; IBEW Local Union 1507 located in Hudson, Ohio; IBEW Local Union 1929 located in Clarksville, Pennsylvania; IBEW Local Union 2089 located in Meadville, Pennsylvania; and IBEW Local Union 2374 located in Jamestown, New York.

The complaint alleges that on or about July 28, 2006, and thereafter, Respondent, in its "Working with Integrity" guidelines posted on Respondent's intranet, announced and implemented and has since maintained a policy which prohibits all of Respondent's employees from disclosing their compensation, benefits, personnel records, or information to any other party. The complaint further alleges that by this conduct, Respondent has engaged in conduct in violation Section 8(a)(1) of the Act.

In its answer, the Respondent denies that its policy is unlawful and in addition, raises the following affirmative defenses:

1. The conduct complained of is time barred under Section 10(b) of the Act, occurring more than 6 months prior to the filing of the charge.
2. That the complaint was issued prematurely with disregard for the provisions of Section 10068 of the Board's Casehandling Manual and was thus an abuse of discretion.
3. That the issues raised in the complaint should have been deferred to the contractual grievance and arbitration provisions of each Local Union under the Board's policy as set forth in *Collyer Insulated Wire,* 192 NLRB 837 (1971).

4. Whether the International Union has standing, as an agent of the Local Unions, to file the unfair labor practice charge on behalf of its Local Unions in this matter.

5. That by its March 2007 amendment to the policy, the Respondent has made the matter moot.

B. The Facts Related to the Complaint Allegations

Martha Pultar is employed by the Union as its director of telecommunications. She oversees the provision of union services to approximately 70,000 members in the telecommunication industry. The six involved Local Unions serviced by the IBEW International Union represent some 300 Windstream employees. These employees had previously been Alltel employees. By letters dated on or about June 30 2006, Windstream notified the affected IBEW Local Unions that it would be responsible for operating the wire line telephone operations of Alltel and on July 17, 2006, would adopt the existing collective-bargaining agreements between the Local Unions and Alltel. Alltel is the primary shareholder of Windstream.

Following the spinoff, on July 25, 2006, Windstream's then COO Keith Paglusch sent an e-mail to all of Windstream's employees informing them of a new "integrity" policy for the company. They were invited to go to a website which had detailed "Working with Integrity" guidelines. This e-mail was not sent to the Union per se, but was received by Local Union officers as employees of Windstream. If an employee went to the website, he or she would find a 22-page document setting out the Company's ethics guidelines. Included among them was a section entitled "Customer and Employee Privacy." Inter alia, this section, which applies to all employees including those represented by a union and those not so represented, included a paragraph dealing with employee compensation, benefits, and personal records, which reads:

> Employee compensation, benefits, and personnel records and information are confidential. Only employees who need to know such information in the course of employment should access such employee information. You should not disclose this information to any other Windstream employee unless that employee has a need to know such information in the course of employment. Except as required to comply with law, you should never disclose this information to any party other than the employee or individual whose access has been authorized by the employee.

This paragraph was followed by some questions and answers that read:

> Q. One of my coworkers pulled up the call records of his old girlfriend. He shared that information with others. Is this acceptable?
>
> A. No. Customer information, including billing information and call detail records, is confidential and should never be accessed or used for anything other than business reasons.
>
> Q. A Customer's spouse has requested account information. The account does not list the spouse as having authorized access. Should I give out the information?
>
> A. No. You should never disclose customer information to any third party unless the customer has authorized such party's access or as required to comply with law.

On or about September 21, 2006, Windstream's then COO Jeff Garner sent out an e-mail to employees announcing an online "Working with Integrity" training course and directing employees to take the course.

Windstream's predecessor, Alltel, had a virtually identical policy in place beginning in March 2006. Like Windstream, Alltel had notified employees of the policy by e-mail and provided a link to a website where the policy was published. Though the Windstream policy exists only on the Company's intranet, Alltel's identical policy was printed in hard copy form at some point. There was no evidence of how the hard copy was distributed, if at all. Each of the collective-bargaining agreements between Windstream and the involved Local Unions has a grievance and arbitration provision. Each of the contracts are between a Windstream subsidiary and the involved Local Unions.

Katherine Warn is the director of labor relations for Windstream and had been employed by Alltel and its predecessor since 1974, in one form or another of the human resource function. Alltel was formed in 1983 with the merger of Alltel Telephone Company of Little Rock, Arkansas, and Midcontinent Company of Hudson, Ohio. Windstream provides wire line telephone service, broadband, and digital television service. Windstream was created when Alltel merged with Valor Telecommunications and spun off the wire line business to Windstream on July 17, 2006. All former employees engaged in this business became employees of Windstream and that corporation adopted all existing collective-bargaining agreement affecting these employees.

In response to the filing of the instant complaint, Windstream modified the alleged unlawful part of its "Integrity" policy to now read:

> Employee compensation, benefits, and personnel records and information are confidential. Only employees who need to know such information in the course of employment should access such employee information through Company records. Therefore, if you are one with access to such information as a part of your responsibilities with the Company, you should not disclose this information to any other Windstream employee unless that employee has a need to know such information in the course of employment. Except as required to comply with law, you should never disclose this information to any party other than the employee or an individual whose access has been authorized by the employee. This does not prohibit you from disclosing or discussing personal, confidential information with others, so long as you did not come into possession of such information through access which you have as part of your formal Company duties.

This revision was made in March 2007, to the "Integrity" policy set out on the intranet, but notice of the change was not sent to employees by e-mail as was the notice of the policy's initial posting. None of the Company's unions were notified of the change.[2] The “Working with Integrity” policy was initially put in place by Alltel and subsequently by Windstream to comply with certain laws such as Sarbanes Oxley and HIPPA.

Warn testified that Windstream is in a very competitive industry and, inter alia, competes for competent employees. For this reason, among others, it does not communicate its employee compensation package to the public or its competition. According to Warn, the “Integrity” policy was not fashioned in any respect in response to union organizing or other union activity. There has been no enforcement of the allegedly unlawful provision of the “Integrity” policy. She further testified that the provision in question is targeted exclusively to the 75 or 80 company human resource, IT, and labor relations employees who have access to company personnel information. This is about 1 percent of the Company’s total work force. Other than this 1 percent of employees, no employees have been informed that they could not share wage and benefit information with other employees. She is aware that employees do share such information based on calls from employees. Warn also testified that her view of what employees are affected by the language in question had not been disseminated to all employees.

The General Counsel agreed with Respondent’s counsel that the decision to issue a complaint in this matter was made prior to receipt of Respondent’s position statement with regard to the case. The complaint itself was issued just after receipt by the Region of that position statement.

C. *Discussion and Conclusions*

1. The affirmative defenses

Before discussing the merits of the complaint allegations respecting the lawfulness of the rule in question, I will address the affirmative defenses. First, with regard to the 10(b) defense, I note that the “mere maintenance” of an unlawful rule is sufficient to violate the Act. An unlawful rule which prohibits employees from exercising their Section 7 rights violates the Act even if there is no evidence that the rule has been enforced. *Guardsmark LLC*, 344 NLRB 809 (2005), citing *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998), which states, “mere maintenance of a rule likely to chill Section 7 activity, whether explicitly or through reasonable interpretation, can amount to an unfair labor practice, even absent evidence of enforcement.” See also *Franklin Iron & Metal Corp.,* 315 NLRB 819, 820 (1994).

Since the mere maintenance of an unlawful rule violates the Act, even if the rule has not been enforced, Section 10(b) does not bar a charge alleging that the maintenance of such a rule is unlawful even should the rule have been originally promulgated outside the 10(b) period. See *Eagle-Picher Industries,* 331 NLRB 169, 174 (2000), “maintenance during the Section 10(b) period of a rule that transgresses employee rights is itself a violation of Section 8(a)(1).” See also *Control Services,* 305 NLRB 435, 442 (1991). Accordingly, the Respondent’s affirmative defense in this regard is without merit.

With regard to the standing of the International Union to file the charge in this case on behalf of its affected Local Unions, Section 102.9 of the Board’s Rules and Regulations and Statements of Procedure states the following:

> <u>Who may file</u> . . . a charge that any person has engaged in and/or is engaging in any unfair labor practice affecting commerce may be made by any person. . . .
>
> Section 102.10 <u>Where to file</u>
>
> A charge alleging that an unfair labor practice has occurred or is occurring in two or more Regions may be filed with the Regional Director for any such Region.

Moreover, the Supreme Court rejected this procedural argument concerning standing as early as *NLRB v. Indiana & Michigan Electric Co.,* 318 U.S. 9, 17–18 (1943), and the Board has since adopted this ruling in *Bagley Products,* 208 NLRB 20, 21 (1973), and has also affirmed that any person can file a ULP charge. See *Utility Workers Local 111 (Ohio Power Co.),* 203 NLRB 230 (1973).

With regard to the argument that this case should be deferred, this case should not be deferred because the conduct that is alleged to violate Section 8(a)(1) of the Act applies to all of Respondent’s employees, both nonunion and union-represented alike. The unrepresented employees, of course, have no access to and are not covered by any of the contractual grievance/arbitration procedures established in the collective-bargaining agreements of the various Local Unions and, accordingly, the charge cannot be deferred. See *Heck’s Inc.,* 293 NLRB 1111, 1116 (1989). Moreover, this matter involves a single-corporatewide action by the Employer affecting multistate jobsites where even its union-represented employees are covered by six different collective-bargaining agreements with differing terms. Thus, even if deferral were otherwise appropriate, the possibility of six different arbitrators using six different contracts and coming up with a single consistent result is highly unlikely. Further, two of the contracts (Local 1189/2374 and Local 1929) restrict an arbitrator to deciding “questions of fact” not “conclusions of law” as would be needed to decide this case. I believe deferral would be totally inappropriate in this case.

With respect to Respondent’s procedural argument that the complaint issued prematurely, I find that it is without merit. The Respondents position in this matter was known to the Region prior to issuance of the complaint and did not and should not have changed the decision to issue it. For the reasons set forth below, the complaint has merit and there was no showing that Respondent was in any way prejudiced by the Region’s handling of this matter.

2. Does Respondent’s rule violate Section 8(a)(1) of the Act?

The Board has consistently held that an employer rule which regards employee compensation and benefit information as confidential and prohibits employees from discussing such information with one another violates Section 8(a)(1) of the Act. See *Double Eagle Hotel & Casino,* 341 NLRB 112, 115 (2004) (quoting *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998); *Radisson Plaza Minneapolis,* 307 NLRB 94 (1992). In examining whether a particular rule so violates Section 8(a)(1), the Board’s analysis requires that the rule be such that “Employees would reasonably construe the language to prohibit Section 7 activity.” *Cintas Corp.,* 344 NLRB 943, 943 (2005). Here, the language of Respondent’s rule clearly meets this test,

[2] Pultar was notified of the change in an attempt to settle this matter.

in that employees could certainly "reasonably construe" the language to prohibit the protected Section 7 activity of discussing wages and benefits with one another. According to the testimony, the rule is aimed at Respondent's employees who have access to personnel information in the course of their employment. The problem is that it does not make that point clear.

The rule in question begins by flatly stating that "employee compensation, benefits, personnel records and information are confidential." Thus, without qualification or ambiguity employees are put on notice that all such information is regarded as "confidential by the Employer." Moreover, the paragraph in question then goes on to state that only employees who "need to know" such information "in the course of employment" should even access it and that employees should not disclose this information in the course of employment to any other Windstream employee unless that employee has a need to know such information in the course of employment. This makes it clear that any other disclosure of compensation and benefit information other than to those who have a need to know related to the course of their employment, i.e., to their job duties, is prohibited. Clearly, this language is so broadly stated that employees could and will construe them to prohibit discussions of wages and working conditions with others. See *University Medical Center,* 335 NLRB 1318 (2001), and *Flamingo Hilton-Laughlin,* 330 NLRB 287 (2000). Moreover, it should be noted that the cover letter from COO Paglusch accompanying issuance of the Windstream "Working with Integrity" guidelines included an admonition that a "zero tolerance" disciplinary policy would be applied to any violation of the policies, thus, imposing an even greater chill on employees' exercise of the Section 7 communication rights in this regard.

Though Respondent argues to the contrary, just reading the original rule and then the rule as modified in March 2007, make it clear that an ambiguity does exist. I find that the original rule does violate Section 8(a)(1) of the Act.

Having made this finding, I note that the purpose of Respondent's rule as articulated at the hearing is reasonable, lawful, and certainly was not intended to coerce, restrain, or interfere with rights guaranteed by Section 7 of the Act. See *Lafayette Park Hotel,* supra; *International Business Machines Corp.,* 265 NLRB 638 (1982). I believe that the rule, as modified in March 2007, does not violate Section 8(a)(1) of the Act. The modification clears up the ambiguity of the original rule and clearly identifies the target audience of the rule and makes it clear as well that employees can discuss among themselves personnel information so long as that information did not come into their possession through access to company records in the course of their job duties. Had the Respondent communicated the modification to its employees in the same manner as it did the original rule, I would have recommended dismissal of this complaint. However, as it did not, the chilling effect of the original rule has not been cured. Thus, I will recommend that as a remedy, Respondent be ordered to disseminate to employees the modified rule in an e-mail to them by the current chief operating officer of the Company. This e-mail should note the changes made to Section 10 of the "Working with Integrity" guidelines. I do not believe any other action is necessary to effectuate the policies of the Act.

Conclusions of Law

1. Respondent, Windstream Corporation, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent's promulgation and maintenance of the portion of its "Working with Integrity" guidelines which prohibits all of Respondent's employees from disclosing their compensation, benefits, personnel records, or information or discussing them with any other party violates Section 8(a)(1) of the Act.
4. The unfair labor practice committed by Respondent affects commerce within the meaning of Section 2(6) and (7) of the Act.
5. Respondent's rule referenced above, as modified in March 2007, does not violate the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent has already rescinded the rule found to have been in violation of the Act and has modified the rule to read in a manner that I find to be lawful. However, it did not give employees notice of the modification in the same manner that it did the original, unlawful rule. Respondent should be ordered to give notice of the modified rule to employees in an e-mail from the chief operating officer of the Company as it did with the original rule. This e-mail should note the changes made to Section 10 of the "Working with Integrity" guidelines. I do not deem it necessary to take any further affirmative action.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Windstream Corporation, Little Rock, Arkansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating and maintaining the portion of its "Working with Integrity" guidelines which prohibits all of Respondent's employees from disclosing their compensation, benefits, personnel records, or information or discussing them with any other party.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of the Board's Order, have the Company's chief operating officer e-mail all of the Company's em-

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ployees notice of the March 2007 modification of the portion of the "Working with Integrity" guidelines set forth as Section 10 customer and employee privacy in the guidelines and relating to the employees the changes made from the original Section 10.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.